82-1318

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

RALPH DeMASI,
LAWRENCE M. LANOUE,
PETITIONERS,

v.

STATE OF RHODE ISLAND,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND

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I

Question Presented

Whether the stop of petitioners' vehicle was justified by a particularized suspicion of criminal activity, where the police followed petitioners' car for twelve blocks in a marked cruiser and observed only that the vehicle rode low in the rear and that a passenger glanced backward at the officer.

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STATEMENT OF THE CASE

Statement of the Facts

Patrolman James Calabro was on routine cruiser patrol at 4:00 A.M. on October 8, 1974 when he observed a 1968 Mercury traveling through downtown Pawtucket. There was nothing remarkable about the car or its three occupants. The Mercury bore Rhode Island license plates and was neither speeding nor moving unusually slowly; its tailights worked; and there were no muffler noises. The only reason Calabro noticed the car was that it seemed to ride low in the rear, so that when crossing the raised double railroad tracks on Industrial Highway, the rear bumper hit the tracks, emitting sparks.

Calabro followed the car for approximately twelve blocks. The Mercury proceeded at a normal pace and a passenger glanced backwards several times at the trailing cruiser. The car followed an easterly direction with some turns dictated by the geography of the area. The officer observed no traffic or vehicular irregularities during the entire time that the Mercury was within his view.

Calabro had been on duty since midnight, and had heard no reports of break-ins or other suspicious activity. The Mercury was not traveling in a high crime area. Calabro did not recognize any of the car's occupants and observed no suspicious activity within the car. He specifically testified that the vehicle did not try to elude him.

Nonetheless, Calabro activated his flashing lights and signaled the Mercury to stop. The driver, Petitioner Lawrence M. Lanoue, pulled over immediately and produced a proper license and registration. Calabro detained the car while he ran a National Crime Information Center (NCIC) check of all of the occupants. The resulting information led to petitioners' arrest. Several hours after petitioners were taken into custody, the police learned of an overnight burglary at a jewelry manufacturing plant several miles from where Officer Calabro stopped the petitioners' vehicle. A search warrant for the trunk of the Mercury was then obtained, and on the basis of evidence found therein petitioners were subsequently indicted and convicted.

Proceedings Below

Petitioners were indicted on charges of breaking and entering in the nighttime with intent to commit larceny, R.I.G.L. §11-8-4, and with stealing goods valued in excess of $500.00. R.I.G.L. §11-41-1. They moved before separate trials to suppress on Fourth Amendment grounds certain jewelry items found in the trunk of the Mercury. Their motions were denied, and both were convicted.

On appeal, the Rhode Island Supreme Court reversed the trial court's denial of the Motions to Suppress. *State* v. *DeMasi & Lanoue, ("Lanoue I")*, __ R.I. __, 419 A.2d 285 (1980). (App. A). The State petitioned this Court for a Writ of Certiorari to review that opinion. The Writ was granted, (Justices Brennan, Stewart, White and Marshall dissenting), 452 U.S. 934, (App. B), and the case was remanded for further consideration in light of the intervening opinion in *United States* v. *Cortez*, 449 U.S. 411 (1981). The case was re-briefed and argued before the Rhode Island Supreme Court. In opinions issued July 29, 1982 and December 7, 1982, the Rhode Island Supreme Court reversed its original ruling in *Lanoue I* and upheld petitioners' conviction. (*State* v. *DeMasi & Lanoue, ("Lanoue II")*, __ R.I. __, 448 A.2d 1210 (1982), (App. C); *State* v. *DeMasi & Lanoue, ("Lanoue III")*, __ R.I. __, __ A.2d __ (Dec. 7, 1982, App. D).

Reasons for Granting the Writ

I. The Stop of Petitioners' Vehicle Was Unreasonable Under the Fourth Amendment.

A. *Investigatory Stops Must be Based on a Particularized Suspicion of Criminal Activity.*

Investigatory stops of vehicles are unreasonable under the Fourth Amendment unless based on an "articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered or that either the vehicle or an occupant is otherwise subject to seizure for violation of law." *Delaware* v. *Prouse*, 440 U.S. 653, 663 (1979); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry* v. *Ohio*, 392 U.S. 1 (1968).[1]

[1] The State conceded during the *DeMasi* Motion to Suppress that there was no probable cause to stop the car. See App. A, p. 9.

United States v. *Cortez*, 449 U.S. 411, 101 S.Ct. 690, 695 (1981), confirms that an officer must consider "the whole picture"—all the facts and circumstances as viewed in light of the officer's experience—in determining whether cause exists for an investigatory stop. *Cortez* requires that an officer's assessment must be based on all of the circumstances before him and must "yield a particularized suspicion...that the particular individual being stopped is engaged in wrongdoing." 101 S.Ct. at 695.

B. *Petitioners' Vehicle Was Stopped on a Mere Hunch of Criminal Activity.*

All of the facts and reasonable inferences available to Officer Calabro at 4:00 A.M. could not have yielded a "particularized suspicion" of criminal activity. *United States* v. *Cortez*, *supra*. The only reason Calabro even noticed the Mercury was because it rode low in the rear, a circumstance certainly innocuous in itself.[2]

Calabro followed the car for twelve blocks and observed nothing to bolster his original suspicion. Indeed, any initial inchoate hunch on Calabro's part could only have been dissipated by his observations as he followed the car. As noted in *Lanoue I*,

> [T]he officer could point to no additional circumstances occurring between the initial sighting and the actual stop which could be said to have raised his initial hunch to the level of a "reasonable suspicion." In fact, the reverse seems to be evident from the record. 419 A.2d at 292. (App. 10).

Calabro testified that he stopped the car because of its heavy trunk and the backwards glances of a rear seat passenger. In *Lanoue I* these glances were summarily dismissed as adding

[2] Calabro testified that a low rear is not an infraction of Rhode Island law and may simply be caused by a defective suspension system.

nothing to the officer's evaluation of the scene before him.[3] See *United States* v. *Lamas*, 608 F.2d 547, 549 (5th Cir. 1979). While Calabro was undoubtedly entitled to factor these glances into the "whole picture," any inference drawn must be reasonable. *Brown* v. *Texas*, 443 U.S. 47 (1979); *United States* v. *Brignoni-Ponce*, 442 U.S. 873, 884 (1975). It is difficult to imagine that any person would fail to notice a marked police cruiser following him for twelve blocks at 4:00 A.M. *United States* v. *Montgomery*, 561 F.2d 875 (D.C. Cir. 1977).

Under *Cortez*, Calabro was required to assess "the entire picture," including the factors which derogated from, as well as those that contributed to, his suspicion of criminal activity. On the "suspicious" side, Calabro saw a car with a heavy trunk and a passenger who glanced backwards at the trailing officer. On the "non-suspicious" side, petitioners were driving a car with local plates, exhibiting no vehicular defects. The car was operated at a normal rate of speed and followed a regular course through downtown Pawtucket. It was not a high crime area, nor had Calabro heard reports of criminal activity that evening. The officer did not recognize the driver or passengers and observed no untoward activity within the car.

Calabro's actions were, at best, based on a hunch that crime was afoot. This hunch fails to meet the Fourth Amendment's "demand for specificity in the information upon which police action is predicated..." *Terry* v. *Ohio*, 392 U.S. at 21, n.18.[4]

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[3] "...we think it is not unusual that a passenger might simply take note of a nearby police vehicle." 419 A.2d 291, n.4. See *United States* v. *Lopez*, 564 F.2d 710, 712 (5th Cir. 1977), in which the Fifth Circuit concluded that a suspects' *failure* to make eye contact with the police "cannot weigh in the balance in any way whatsoever.... Reasonable suspicion should not turn on the ophthalmalogical reactions of the appellant." To hold that eye contact, or avoidance of contact, is a "legitimate consideration in deciding whether to stop a vehicle would put the officers in a classic 'heads I win, tails you lose' position." *United States* v. *Escamilla*, 560 F.2d 1229, 1233 (1977).

[4] The *Lanoue* trial court denied the Motion to Suppress without analysis under *Terry* v. *Ohio*, because Rhode Island law permitted (prior to *Delaware* v. *Prouse*, 440 U.S. 648 (1979)) random stops of motorists for

C. *The Mercury Did Not Try to Elude the Police.*

The Rhode Island Supreme Court's reversal of its initial opinion in *Lanoue I*[5] was based in large part on its finding in *Lanoue II* that the Mercury tried to elude Calabro, and that this elusiveness gave substance and specificity to Calabro's decision to stop the car.

Any contention that petitioners "eluded" the officer is a perversion of the facts as testified to by Calabro, the facts as found by both[6] trial judges, and the explicit language of *Lanoue I*. See *United States* v. *Gooding*, F.2d , 32 Cr.L.R. 2241 (Dec. 7, 1982).

Calabro testified at length during the suppression hearings, and a diagram was drawn of the path taken by the Mercury and the police cruiser. Calabro specifically testified that, given the geography of the area, the Mercury continued on the same southeast course, did not circle around, or go north or west. When asked, "Did this vehicle attempt to elude you?", Calabro answered, "I don't know whether he purposely meant to elude me or not. It appeared that way but they did pull over; when we did finally put the lights on, the vehicle did pull over."

Calabro gave only two reasons for stopping the car: "The vehicle was heavily laden in the rear, and that's why I was

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license and registration checks, and Lanoue was driving the Mercury. As to DeMasi, however, the hearing judge found that the police had no cause to detain him, "as there was no probable cause (or) even reason to suspect that he committed or was about to commit a crime." In light of *Delaware* v. *Prouse*, *supra*, this reasoning obviously applies to Lanoue as well.

[5] The *Lanoue I* opinion concluded that "the objective facts taken together could only support a mere inarticulate hunch that criminal activity was afoot. Such a hunch was insufficient, under *Terry* and its progeny, to justify the stop of Lanoue's Mercury." 419 A.2d 1292 (App. A, p. 11).

[6] Separate hearings were held before different judges, in 1977 and 1978, on each petitioner's Motion to Suppress. Calabro testified at both hearings, and both judges found as fact that the Mercury did not attempt to elude the officer.

stopping the vehicle" . . . "Only thing suspicious in the whole vehicle was the operator in the back seat who kept looking back, and the weight of the vehicle being heavily burdened in the rear of the vehicle."

The trial court summarized the officer's testimony: "Calabro testified that at no time did the vehicle attempt to evade or elude him, and that once he signaled it to stop that it pulled over and there was no attempt during this following to elude the officer." These facts as found by the trial court are entitled to substantial deference by this Court. *Brewer* v. *Williams*, 430 U.S. 387 (1977); *Brown* v. *Allen*, 344 U.S. 443 (1953).

Lanoue I recognized that "elusiveness" was not a factor in Calabro's decision to stop the car:

> Officer Calabro's decision to radio for assistance and to stop the vehicle was apparently based *solely* on the fact that at the time he first spotted the Mercury, the back of the car was over-weighted and it struck the railroad tracks. . .
>
> . . . . .
>
> Furthermore, the officer could point to no additional circumstances occurring between the initial sighting and the actual stop which could be said to have raised his initial hunch to the level of a "reasonable suspicion." In fact, the reverse appears to be evident from the record. The officer testified. . . *that the driver made no attempt to elude the officer*. 419 A.2d 291-292 (App. A, p. 10) (emphasis added).

The shocking discrepancy between the facts as found in *Lanoue I* and *Lanoue II*[7] can only be attributed to an apparent perception that the grant of certiorari in *Lanoue I* con-

[7] Petitioners timely moved for re-hearing, on the grounds that the majority opinion in *Lanoue II* was based on a misapprehension of material facts. The Motion was denied.

stituted a mandate from this Court that *Lanoue I* be reversed in light of *United States* v. *Cortez*, 449 U.S. 411, 101 S.Ct. 690 (1981).

D. United States v. Cortez *Demonstrates That the Stop of Petitioners' Vehicle Was Not Justified By "The Whole Picture."*

Cortez' vehicle was detained in the Arizona desert under circumstances which, to the untrained eye, would not give rise to a reasonable suspicion of criminal activity. However, the Border Patrol officers who stopped Cortez possessed specialized knowledge which lent particular significance to Cortez' ostensibly innocuous activity. The officers had been investigating a unique pattern of alien smuggling, and their investigation had pinpointed the probable days of the week, time of day, weather, travel pattern and description of their quarry's vehicle.

The Border Patrol stopped Cortez when his vehicle met all of the criteria indicated by the investigation. At the moment of the stop, the officers could readily identify numerous specific reasons for singling out Cortez' van.

Unlike the Border Patrol police in *Cortez*, Calabro possessed no knowledge—of the area, of the suspects, or of a pattern of activity—that gave special significance to the fact that Lanoue's car rode heavy in the rear and a passenger glanced backwards. Indeed, *Cortez* serves as a stark demonstration, by contrast, of the paucity of information available to Calabro as he stopped petitioner's car.

Calabro had received no "tips" or reports of criminal activity. *United States* v. *Sierra-Hernandez*, 581 F.2d 760 (9th Cir. 1978), *cert. den.* 439 U.S. 396. Lanoue's car bore local plates and raised no suspicion that the Mercury was in unfamiliar territory. *United States* v. *Morrison*, 546 F.2d 319 (9th Cir. 1976). There was no evidence that petitioners were traveling

in a high-crime area.[8] *United States* v. *Hernandez-Gonzalez*, 608 F.2d 1240 (9th Cir. 1979). Indeed, the only clue of possible crime was the heavy trunk which, absent other compelling factors, was simply not enough to justify a stop. *United States* v. *Pacheco*, 617 F.2d 84 (5th Cir. 1980).

Conclusion

The *Lanoue II* decision, which is based on the identical facts and law as *Lanoue I*, is clearly erroneous. The trial court found that Calabro "had no specific crime in mind when he stopped this motor vehicle," and that there was no reason to suspect that DeMasi was involved in wrongdoing. In standing *Lanoue I* on its head, *Lanoue II* distorts the facts with hyperbole[9] and grasps at straws to justify baseless police conduct.

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[8] The State's contention in its Petition for Writ of Certiorari (1980), p. 9, that "Calabro could have reasonably suspected that the trio in the Mercury were leaving with property after burglarizing one of the many manufacturing plants located in the industrial area of Pawtucket" is baseless speculation. The sole evidence regarding the nature of the area was Calabro's statement that he first saw the Mercury in industrial downtown Pawtucket and that the vehicle eventually crossed over into a residential area. There was no evidence whatsoever regarding the existence, location, number or nature of "manufacturing plants" and Calabro specifically testified that he had no particular criminal activity in mind when he stopped the car.

[9] The easterly travel of the Mercury, which the trial court and *Lanoue I* found not to be elusive, was characterized in *Lanoue II* as "an early morning motorized game of hide-and-seek;" App. C, p. 27; the fact that the Mercury's rear bumper hit the raised railroad track and emitted sparks was described in *Lanoue II* as "the night [was] illuminated by sparks flying from the railroad tracks." App. C, p. 27.

If *Terry* maintains any vitality in setting minimum standards for police conduct, and if that conduct must be based on a particularized suspicion of crime, then the decision of the Rhode Island Supreme Court in *Lanoue II* must be reversed.

Respectfully submitted,
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